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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 667

JACOB F. HOLMES, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and MACON, DUBLIN & SAVANNAH RAILROAD COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

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Of Counsel.

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JACOB F. HOLMES, JAMES D. BELL, JEANNETTE P. BELL, CHARLES E. PORTEOUS, MARGARET F. SCHMUCKER, AMELIA A. MEURY, JANE S. MATHEWSON AND G. FREDERIC HELBIG,

Plaintiffs,

against

UNITED STATES OF AMERICA AND MACON, DUBLIN & SAVANNAH RAILROAD COMPANY,

Defendants,

INTERSTATE COMMERCE COMMISSION,

Intervening Defendant

JURISDICTIONAL STATEMENT

In compliance with Rule 12 of the Revised Rules of the Supreme Court of the United States, the appellants submit herewith their statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain the appeal in this cause:

1. Jurisdiction of the Supreme Court of the United States to review by direct appeal the judgment entered herein is conferred by Title 28, United States Code, Section 1253.

2. The statute of the United States, the validity of which is herein challenged on the ground that it is unconstitutional, is Section 20b of the Interstate Commerce Act, Title 49, United States Code, Section 20b, 62 Stat. 163, which in part provides as follows:

> "Section 20b. Modification of railroad financial structures-Approval and authorization of Commission; exclusion of equipment-trust securities
>
> (1) It shall be lawful (any express provision contained in any mortgage, indenture, deed of trust, corporate charter, stock certificate, or other instrument or any provision of State law to the contrary notwithstanding), with the approval and authorization of the Commission, as provided in paragraph (2) of this section, for a carrier as defined in section 20a (1) of this title to alter or modify (a) any provision of any class or classes of its securities as defined in section 20a (2) of this title being hereinafter in this section sometimes called 'securities'; or (b) any provision of any mortgage, indenture, deed of trust, corporate charter, or other instrument pursuant to which any class of its securities shall have been issued or by which any class of its obligations is secured (hereinafter referred to as instruments);
>
> • • • • • • •
>
> Application; public hearing; findings; submission of plan to security holders; order of Commission; force and effect
>
> (2) Whenever an alteration or modification is proposed under paragraph (1) of this section, the carrier seeking authority therefor shall, pursuant to such rules and regulations as the Commission shall prescribe, present an application to the Commission. • • • If the Commission, after hearing, in addition to making (in any case where such alteration or modification involves an issuance of securities) the findings required by paragraph (2) of section 20a of this title, not inconsistant with paragraph (1) of this section shall find

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that, subject to such terms and conditions and with such amendments as it shall determine to be just and reasonable, the proposed alteration or modification—

(a) is within the scope of paragraph (1) of this section;

(b) will be in the public interest;

(c) will be in the best interests of the carrier, of each class of its stockholders, and of the holders of each class of its obligations affected by such modification or alteration; and

(d) will not be adverse to the interests of any creditor of the carrier not affected by such modification or alteration, then (unless the applicant, carrier shall withdraw its application) the Commission shall cause the carrier, in such manner as it shall direct, to submit the proposed alteration or modification (with such terms, conditions, and amendments, if any) to the holders of each class of its securities affected thereby, for acceptance or rejection. * * * If the Commission shall find that as a result of such submission the proposed alteration or modification has been assented to by the holders of at least 75 per centum of the aggregate principal amount or number of shares outstanding of each class of securities affected thereby (or in any case where 75 per centum thereof is held by fewer than twenty-five holders, such larger percentage, if any, as the Commission may determine to be just and reasonable and in the public interest), the Commission shall enter an order approving and authorizing the proposed alteration or modification upon the terms and conditions and with the amendments, if any, so determined to be just and reasonable. * * * Any alteration or modification which shall become and be binding pursuant to the approval and authority of the Commission hereunder shall be binding upon each holder of any security of the carrier of each class affected by such alteration or modification, * * * and when any alteration or modification shall become and be

binding the rights of each such holder and of any such trustee or other party shall be correspondingly altered or modified."

3. The judgment of the District Court sought to be revised was entered on the 16th day of January, 1950 and the application for appeal was filed on the 27th day of January, 1950 and is presented to the District Court herewith, to wit, on the 27th day of January, 1950.

4. This suit was brought to vacate, set aside, suspend and annul an order of the Interstate Commerce Commission dated March 10, 1949 and to restrain and enjoin, perpetually, the enforcement thereof on the ground that Section 20b of the Interstate Commerce Act pursuant to provisions of which the order was made, contravenes the Constitution of the United States. On January 3, 1904, Macon, Dublin & Savannah Railroad Company authorized the issuance of $1,840,000 principal amount of First Mortgage Forty Year Five Percent Bonds. The bonds, by their terms, became due and payable on January 1, 1947. Of the $1,840,000 principal amount of bonds authorized, $1,733,000 principal amount were issued and $107,000 principal amount of bonds were never issued. When the order of March 10, 1949 was made, $1,529,000 principal amount of bonds were outstanding and $204,000 principal amount of bonds were held in Macon, Dublin & Savannah Railroad Company's treasury. In April, 1948, the Interstate Commerce Act was amended by the addition thereto of Section 20b and on June 15, 1948, Macon, Dublin & Savannah Railroad Company made application for relief under that section. The plan which was submitted in the application provided for the extension of the maturity date from January 1, 1947 to January 1, 1972 and for leave to reissue the $204,000 principal amount of bonds held in the treasury and to issue the $107,000 principal amount of bonds which had never been issued. On

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December 9, 1948, the Interstate Commerce Commission rendered a report on the plan and thereafter entered an order approving it in the form submitted. In that order the Commission authorized Macon, Dublin & Savannah Railroad Company to solicit consents to the plan. This Macon did, and having procured approval of the plan by holders of upwards of 75% of the outstanding bonds, the Commission made the order and report dated March 10, 1949. Application for the reconsideration of the report and order dated December 9, 1949 and the application for reconsideration was denied by the Commission.

5. The defendant, United States of America and the intervenor, Interstate Commerce Commission, moved to dismiss the complaint herein on the ground that the Court did not have jurisdiction because the plaintiffs had not made application for a rehearing or a reconsideration of the order of March 10, 1949 as, it was alleged, is required by Section 17(9) of the Interstate Commerce Act, as amended (49 United States Code 17(9)). The Court after trial rendered a decision holding that it lacked jurisdiction and directed a dismissal of the complaint therein. The District Court rendered an opinion, a copy of which is hereto annexed.

6. *United States* v. *Idaho*, 298 U. S. 105, sustains the jurisdiction of the Supreme Court of the United States to entertain this appeal.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil 50-320

JACOB F. HOLMES, ET AL., *Plaintiffs*,

vs.

UNITED STATES OF AMERICA, ET AL., *Defendants*

Action by certain bondholders of Macon, Dublin & Savannah Railroad Company to set aside an order made by Division 4 of the Interstate Commerce Commission in a proceeding brought under section 20(b) of the Interstate Commerce Act, 49 U. S. C. Section 20(b). Complaint dismissed for lack of jurisdiction.

David M. Palley, and Siegelbaum, Rosenzweig, Palley & Berger, all of New York City, for plaintiffs.

William D. McFarlane, Special Assistant to the Attorney General and Gerald L. Phelps, Special Attorney, Department of Justice; Herbert A. Bergson, Assistant Attorney General, James E. Kilday, Special Assistant to the Attorney General, John F. X. McGohey, United States Attorney, for defendant United States of America.

Harold J. Gallagher, and Willkie Owen Farr Gallagher & Walton, all of New York City, for defendant Macon, Dublin & Savannah Railroad Co.

Daniel W. Knowlton, Chief Counsel, for intervenor-defendant Interstate Commerce Commission.

By leave of Court, a brief *amici curiae* was filed by Fred N. Oliver, Willard P. Scott, Chauncey H. Hand, Jr., and G. Clark Cummings, all of New York City, for Railroad Securities Owners Association, Inc., R. J. Fletcher, of Boston, Mass. for Boston & Maine Railroad, and E. Spencer Miller, of Portland, Maine, for Maine Central Railroad Co.

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Before Swan Circuit Judge, and Ryan and Samuel H. Kaufman, District Judges

SWAN, Circuit Judge:

This is a suit by eight holders of First Mortgage Forty Year 5% Bonds of Macon, Dublin & Savannah Railroad Company to set aside an order made on March 10, 1949 by Division 4 of the Interstate Commerce Commission authorizing an extension of the maturity date, and certain other modifications, of said bonds. The complaint was filed May 24, 1949. The suit is brought under 28 U. S. C. Sections 1336, 2321-2325 and 49 U. S. C. Section 17(9). A three judge court was convened pursuant to 28 U. S. C. Section 2284. The Interstate Commerce Commission has intervened as a party defendant pursuant to 28 U. S. C. Section 2323. After answers were filed, the case was brought on for final hearing on October 10, 1949. With the court's consent briefs were to be submitted later and they have been received.

The order under attack was entered in a proceeding initiated on June 15, 1948 by the Railroad Company under section 20(b) of the Interstate Commerce Act, 49 U. S. C. Section 20(b), to obtain modifications of its First Mortgage bond issue which had matured January 1, 1947, the principal modification proposed being an extension of the maturity date to 1972. After hearings, Division 4 of the Commission issued its report and order of December 9, 1948, 271 I. C. C. 376. This directed that the proposed modifications be submitted to the bondholders for acceptance or rejection. It detailed the procedure to be followed on submission and directed: that the applicant Railroad file with the Commission a certificate as to acceptances; that upon request the applicant make available to the parties to the proceeding a list of the names and addresses of bondholders; and that all letters, circulars, etc., to be sent to bondholders be submitted to the Commission for approval. One of the plaintiffs, G. Frederick Helbig, petitioned for reconsideration of the order of December 9. His petition was denied by the full Commission on January 13, 1949.

Thereafter, on March 10, 1949, Division 4 made another report and order, 271 I. C. C. 498. The report found that

the plan of modification had been approved by holders of not less than 75% of the class of securities affected, in accordance with Section 20(b). The order approved and authorized the proposed modification and directed that it become effective at 12:01 A. M. on the day following the applicant's publication of a declaration to that effect. Such a declaration was thereafter published. None of the plaintiffs applied to the Commission for reconsideration of the order of March 10.

The plaintiffs contend that the order of March 10 is null and void on the ground that section 20(b) of the Interstate Commerce Act is unconstitutional because it (1) contravenes the due process clause of the Fifth Amendment; (2) is a delegation to the Commission of legislative power in contravention of Article I, section 1 of the Constitution; (3) is a delegation of judicial power in contravention of Article III, section 1; and (4) is an exercise of a power not delegated to the United States in contravention of the Tenth Amendment. Before these questions can be reached, we must consider the defense set up in the answers of the United States and the Commission, namely, that the Court lacks jurisdiction because the plaintiffs have failed to exhaust their administrative remedy in accordance with section 17(9) of the Interstate Commerce Act, 49 U. S. C. Section 17(9). The section requires that rehearing, reargument or reconsideration by the full Commission be sought prior to judicial review of an order by a Division of the Commission.[1]

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[1] Section17(9): "When an application for rehearing, reargument or reconsideration of any decision, order or requirement of a division * * * shall have been made and shall have been denied, or after rehearing, reargument or reconsideration otherwise disposed of by the Commission, * * * a suit to enforce, enjoin, suspend, or set aside such decision * * * may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, *but not otherwise.*" (Italics supplied.)

The Conference Report states (H. Rep. 2832, 76th Cong. 3rd sess. p. 72): "A new paragraph (9) is included providing that orders of a Division, an individual Commissioner or a Board, shall be subject to judicial review as in the case of full Commission orders, *after an application for rehearing has been made and acted upon.*" (Italics supplied.)

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The plaintiffs argue that their administrative remedy was in fact exhausted when the full Commission denied Helbig's petition for reconsideration of Division 4's order of December 9. They rely on Rule 101(f) of the Commission,[2] which, they say, precluded them from seeking reconsideration of the order of March 10. We do not agree. The rule merely forbids successive petitions for reconsideration on the same grounds with respect to the same order. So the Commission interprets the Rule and we accept its interpretation. The two orders were not the same. The December order merely authorized the Railroad to submit the proposed modification to its bondholders for acceptance or rejection by them. Denial of reconsideration of that order left the plaintiffs free to ask reconsideration of the order of March 10, which did authorize the proposed modification.

If Rule 101(f) were to be construed as the plaintiff contends, it would run counter to Section 17(9) and would therefore be invalid. That section lays down conditions precedent to judicial review of the order of March 10. The Commission could not by its Rules extend this court's jurisdiction beyond the Congressional grant. The United States is a necessary party to a suit to set aside an order of the Commission. 28 U. S. C. Section 2322. And the United States is immune from suit except upon terms laid down by Congress on which it consents to be sued. United States v. Sherwood, 312 U. S. 584, 586. Since Congress has in explicit terms required a petition for reconsideration to be filed before review in the courts is sought, this court lacks jurisdiction to entertain the present suit.

Plaintiffs further argue that a petition for reconsideration of the March 10 order was unnecessary because the only ground on which it is attacked is the constitutional one, and the Commission has announced that it cannot pass on the constitutionality of legislation which it is required to ad-

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[2] "(f) *Successive petitions on same grounds, not entertained.*—A successive petition under subdivision (d) of this rule filed by the same party or parties, and upon substantially the same grounds as a former petition, which has been considered and denied by the entire Commission, or by an appropriate appellate division, will not be entertained."

minister. Lehigh Valley R. R. Co., 271 I. C. C. 553, 589. We may assume without decision that such is the case. But we cannot assume that upon petition for reconsideration the Commission would not have reversed the order of March 10, thereby eliminating the constitutional question here presented. A recent decision of the Supreme Court warns us not to seek out constitutional questions which may be avoided by the orderly termination of the administrative process. Aircraft & Diesel Corp. v. Hirsch, 331 U. S. 752, 772.[3] It is true that in the same case the court said that where a constitutional question is coupled with a sufficient showing of inadequacy of the prescribed administrative relief and of irreparable injury flowing from delay incident to following the prescribed procedure, the administrative process may be dispensed with, although "this rule is not one of mere convenience or ready application." Id. at 773. Here, however, the plaintiffs do not attempt to assert that they would have been irreparably injured had they applied for reconsideratiion. Without assertion and proof of irreparable injury, they cannot bring themselves within this narrow exception to the well-established rule that administrative remedies must be exhausted before judicial review becomes available. Macauley v. Waterman S. S. Co., 327 U. S. 540; Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41. The general rule would be sufficient to decide this case. The explicit command of Section 17(9) makes the result inevitable. Congress must have been aware that the constitutionality of various provisions of the Interstate Commerce Act would be challenged in suits to set aside orders of the Commission. The fact that the substantive issue here presented is constitutional cannot remove the barrier to this suit interposed by Section 17(9). The complaint is dismissed for want of jurisdiction.

If the parties desire formal findings of fact pursuant to Rule 52a, Federal Rules of Civil Procedure, 28 U. S. C. A.

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[3] "• • • the very fact that constitutional issues are put forward constitutes a strong reason for not allowing this suit either to anticipate or to take the place of the Tax Court's final performance of its function. • • • The Tax Court may decide entirely in appellants' favor."

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foll. Section 723, they may submit proposed findings within ten days.

(S.) THOMAS W. SWAN,
Circuit Judge;

(S.) SYLVESTER J. RYAN,
District Judge;

(S.) SAMUEL H. KAUFMAN,
District Judge.

November 25, 1949.

APPENDIX "B"

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil No. 50-320

JACOB F. HOLMES, ET AL., *Plaintiffs,*

vs.

UNITED STATES OF AMERICA, ET AL., *Defendants*

The above-styled cause having come on to be heard on October 10, 1949 before a specially constituted three-judge United States District Court, and the Court's opinion having been filed herein, the Court now makes the following findings of fact and conclusions of law:

1. The defendant Macon, Dublin & Savannah Railroad Company is a corporation duly organized under the laws of the State of Georgia and is, and at all times hereinafter mentioned was, a carrier by railroad.

2. The plaintiffs Jacob F. Holmes, James D. Bell, Jeannette P. Bell, Charles E. Porteous, Margaret F. Schmucker, and G. Frederic Helbig are all residents of the Southern District of New York within the jurisdiction of this Court and Amelia A. Meury and Jane S. Mathewson are residents of the Northern District of New York.

3. On January 3, 1907, the Macon, Dublin & Savannah Railroad Company, a defendant herein, issued its First Mortgage Forty Year Five Percent Bonds in the authorized amount of $1,840,000 to mature on January 1, 1947, of which $1,733,000 were purchased by the general public.

4. The plaintiffs severally owned some of these bonds, the individual face amounts totalling $25,000.00.

5. On June 15, 1948, the defendant Macon, Dublin & Savannah Railroad Company filed an application with the Interstate Commerce Commission for authority under Section 20b of the Interstate Commerce Act to place in effect a plan which would extend the maturity date of its Forty Year Five Percent Bonds from January 1, 1947 to January 1, 1972, and would amend these bonds and the mortgage in certain other respects.

6. After hearings, and on December 9, 1948 Division 4 of the Interstate Commerce Commission issued a report and order approving the authority sought by the Macon, Dublin & Savannah Railroad Company, subject to the prior performance of certain conditions, including the securing of approval of the proposed plan by bondholders representing at least 75 percent of the face amount of the bonds.

7. On or about January 7, 1949, the plaintiff G. Frederic Helbig filed with the Commission a petition for reconsideration of the report and order issued by Division 4 of the Commission on December 9, 1948, and on January 13, 1949, after having stayed the effective date of that order issued by Division 4, the Commission denied the petition for reconsideration.

8. Thereafter, and on February 18, 1949, the defendant Macon, Dublin & Savannah Railroad Company filed with the Commission a sworn certificate of the Mercantile Trust Company of Baltimore, Maryland, depository under the proposed plan, setting forth, among other things, that the holders of 86.08 percent of the Forty Year Five Percent Bonds had assented to the proposed plan to modify the maturity date and to make other changes in the bonds and the mortgage.

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9. On March 10, 1949, Division 4 of the Interstate Commerce Commission issued its report and order, finding that as a result of the submission of the proposed plan to the bondholders, assents representing not less than 75 percent of the aggregate principal amount of the bonds affected had been given to the plan, in accordance with Section 20b of the Interstate Commerce Act. By this report and order Division 4 approved and authorized the Macon, Dublin & Savannah Railroad Company to place the proposed plan of alteration or modification into effect upon the terms and conditions theretofore found by Division 4 to be just and reasonable.

10. None of the plaintiffs applied to the Interstate Commerce Commission for reconsideration of the report and order of March 10, 1949 issued by Division 4 of the Interstate Commerce Commission.

11. On May 24, 1949, the plaintiffs filed with this Court the complaint in this cause, in which the plaintiffs sought an order or decree vacating, annulling, setting aside and enjoining the order issued by Division 4 of the Interstate Commerce Commission on March 10, 1949 on the grounds that said order contravened various provisions of the Constitution of the United States.

Conclusions of Law

1. The United States is immune from suit except upon terms laid down by Congress on which it consents to be sued.

2. Section 17(9) of the Interstate Commerce Act, 49 U. S. C. Section 17(9), contains a condition precedent to suit on an order issued by a division of the Interstate Commerce Commission and requires that rehearing, reargument or reconsideration by the full Commission be sought prior to judicial review of such an order.

3. This administrative remedy was required to be sought as to the order of March 10, 1949 on which suit has been brought, notwithstanding that rehearing, reargument or

reconsideration was sought as to the prior order of December 9, 1948.

4. The complaint is dismissed for want of jurisdiction.

(S.) THOMAS W. SWAN,
C. J.;

(S.) SYLVESTER J. RYAN,
D. J.;

(S.) SAMUEL H. KAUFMAN,
D. J.

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